APR 27 1981

No. 80-1628

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

FRANCIS P. WALL
Appellant,

vs.

JOHN KEVIN DONOVAN,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Two

MOTION TO DISMISS

DALE E. FREDERICKS
SEDGWICK, DETERT, MORAN & ARNOLD
111 Pine Street
San Francisco, CA 94111
(415) 982-0303
Attorneys for Appellee

BOWNE-PERNAU WALSH • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
The state statute involved and the nature of the case	1
Argument	3

TABLE OF AUTHORITIES CITED

Cases

Campbell v. Magana (1960) 184 Cal.App.2d 751, 8 Cal. Rptr. 32 4

Cardinale v. Louisiana (1969) 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 3

Fithian v. Fithian (1974) 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449, cert. denied 419 U.S. 829 ..... 2, 4

Garrity v. New Jersey (1967) 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 3

Herb v. Pitcairn (1954) 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 5

In re Marriage of Milhan (1980) 27 Cal.3d 765, 166 Cal. Rptr. 533, 613 P.2d 812 4

New York Times v. Jascalevich (1978) 439 U.S. 1317, 99 S.Ct. 6, 58 L.Ed.2d 25 5

Wilson v. Cook (1946) 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 3

Constitutions

United States Constitution, Article VI, Clause 2 2

Rules

Rules of the United States Supreme Court, Rule 16(b) 1

Statutes

California Civil Code, section 4803 ..... 1, 3

42 U.S.C. section 1257 3

No. 80-1628

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

FRANCIS P. WALL
Appellant,

VS.

JOHN KEVIN DONOVAN,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Two

MOTION TO DISMISS

Appellee, John Kevin Donovan, moves the Court to dismiss the appeal of Appellant, Francis P. Wall, on the grounds that the federal question sought to be reviewed was not properly raised or expressly passed on and that the judgment rests on an adequate non-federal basis. Rule 16(b).

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

Appellant contends that, when applied to federal military retirement pay, California Civil Code Section 4803, which defines "quasi-community property", is repugnant

to the supremacy clause of the United States Constitution, Article VI, Clause 2 and those laws of the United States cited in Appendix E to Appellant's Jurisdictional Statement.

In this lawyer's malpractice case, Appellant alleged that Appellee, his attorney in an underlying domestic relations case, breached the duty of care required of a California lawyer in advising him to agree to share his federal military retirement pay with his wife. Appellant claimed that a careful California lawyer would have counseled him to challenge the jurisdiction of the California domestic relations court over his federal military retirement pay on the grounds that (1) Appellant was not a California resident; and (2) federal law preempted state jurisdiction over federal military retirement pay in domestic relations cases.

Appellee moved for summary judgment on the grounds that (1) Appellant was collaterally estopped to relitigate the issue of his residence by the findings of the domestic relations court that he was a resident of California; and (2) the decision of the California Supreme Court in *Fithian v. Fithian* (1974) 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449, *cert. denied* 419 U.S. 829:

> "Husband specifically challenges the trial court's characterization of a portion of his federal military retirement pay as community property, contending such a determination is forbidden to the states by the supremacy clause (art. VI, cl. 2) of the United States Constitution. *We conclude federal military retirement pay is properly the subject of California community property law and therefore affirm the judgment.*"

10 Cal.3d 595. (Emphasis added)

The trial court granted Appellee's motion for summary judgment and the California Court of Appeal affirmed (see Appendix A to Appellant's Jurisdictional Statement).

ARGUMENT

It is not enough to invoke the Court's obligatory jurisdiction under Section 1257 that a state statute was involved in the state court proceedings. The validity of the statute, either on its face or as applied in a particular case, must have been drawn in question and ruled upon. *Garrity v. New Jersey* (1967) 385 U.S. 493, 495-496, 87 S.Ct. 616, 17 L.Ed.2d 562; *Cardinale v. Louisiana* (1969) 394 U.S. 437, 439, 89 S.Ct. 1161, 22 L.Ed.2d 398; *Wilson v. Cook* (1946) 327 U.S. 474, 480, 66 S.Ct. 663, 90 L.Ed. 793.

The issue before the California trial court and the California Court of Appeal below was not whether Civil Code Section 4803, when applied to military retirement pay, was repugnant to the supremacy clause of the United States Constitution. Rather the issue was whether Appellee committed actionable malpractice under California law in failing to make such claim on behalf of Appellant in the underlying domestic relations case.

> "One who establishes malpractice on the part of his attorney in prosecuting or defending a lawsuit must also prove that careful management of it would have resulted in recovery of a favorable judgment and collection of the same, or in case of a defense, that proper handling would have resulted in a judgment for the client; that there is no damage in the absence of these latter elements, and the burden of proof rests

> upon the plaintiff to prove recoverability and collectability of a plaintiff's claim or ability to establish a defense for the client who has been sued."

Campbell v. Magana (1960) 184 Cal.App.2d 751, 754, 8 Cal.Rptr. 32.

Appellant was unable to sustain his burden to show damage for Appellee's failure to raise federal pre-emption because of the decisions of the California Supreme Court in *Fithian* (supra) and *In re Marriage of Milhan* (1980) 27 Cal.3d 765, 166 Cal.Rptr. 533, 613 P.2d 812 which both expressly rejected the federal pre-emption argument.

Appellant therefore seeks to sustain his burden to show damage by asking this Court to speculate that, had Appellee raised the federal pre-emption argument in the domestic relations proceeding and, after appealing the underlying case to the highest state court, had prevailed upon the Court to review this question, the Court would have overruled *Fithian* and *Milhan*.

If the Court were to advise Appellant what it would have done under this hypothetical set of facts, in order to affirm or reverse the California Court of Appeal, the Court would then have to consider, given its hypothetical ruling in the domestic relations case, whether Appellant has a viable claim for legal malpractice under California law.

Whether Appellant has established a claim for legal malpractice under California law is a non-federal question. Where a state court decides only non-federal questions the Court has no jurisdiction to review such decisions.

Herb v. Pitcairn (1954) 324 U.S. 117, 125, 65 S.Ct. 459, 89 L.Ed. 789; *New York Times v. Jascalevich* (1978) 439 U.S. 1317, 1318, 99 S.Ct. 6, 58 L.Ed.2d 25.

For the foregoing reasons the appeal should be dismissed.

Respectfully submitted,

SEDGWICK, DETERT, MORAN & ARNOLD
DALE E. FREDERICKS
111 Pine Street
San Francisco, CA 94111
(415) 982-0303
Attorneys for Appellee